Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1343

ALBERT ARTHUR QUIROZ, Petitioner

v.

THE STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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THE STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The petitioner, Albert Arthur Quiroz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this proceeding on November 19, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, which was rendered not for

publication and which was filed November 19, 1975, appears in the Appendix hereto. A copy of the Order denying the Motion for Rehearing also appears in the Appendix hereto. No other opinions were rendered.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of Arizona was filed on November 19, 1975. A timely petition for rehearing was denied on December 23, 1975, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

QUESTION PRESENTED

Whether the petitioner was accorded due process of law in regard to sentencing when he was denied the right to ascertain the source or the particulars of an allegation made to the Court

that he was involved in large-scale criminal activities beyond the scope of the crime of which he was convicted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

The Sixth Amendment to the Constitution of the United States of America is also involved:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The process at issue is sentencing. The act at issue is the denial of access to sources

and particulars supportive of allegations in presentence information reports that the petitioner was part of a large-scale criminal enterprise.

The petitioner Albert Arthur Quiroz entered a plea of guilty to a charge of transporting marijuana in violation of A.R.S. § 36-1002.07. The validity of the plea is not at issue herein. Petitioner had been indicted with two others (Stadie and Maytoreno). Prior to the original sentencing on February 4, 1974, the presentence investigation officer conveyed information to the sentencing judge which is epitomized by the following passage from Exhibit B in the Record on Appeal before the Arizona Supreme Court:

> "The Deputy County Attorney, and state and local narcotics officers, discussed documented evidence which established conclusively that the co-principals / petitioner was thereinabove identified

> as a co-principal_7 and others were part of a large group of narcotic and drug dealers who operated on both sides of the Arizona-Sonora Border, and distributed drugs in several major cities throughout the United States. Details of the evidence remain confidential, not for disclosure, because of on-going police investigation."

Petitioner was originally sentenced to a term of 5 to 8 years in the Arizona State Prison.

Petitioner thereafter moved for reconsideration of the sentence and in the course of the hearing on the motion sought production of the sources of information supporting the challenged allegation. Production was denied upon the asserted "representation of fact" of the prosecuting attorney that there was an "on-going if not active investigation" as to other individuals. (Reporter's Transcript of February 19, 1974, P. 52). The representation was accepted by the trial court but there is

nothing in the record to support it and the determination is therefore not reviewable. The trial court also held that the petitioner's probation officer's oral statements to him were privileged (Reporter's Transcript February 19, 1974, P. 29).

Although the trial court ultimately reduced petitioner's prison term to the minimum provided, the offense was petitioner's first and he presented a strong case for probation. Petitioner was a successful businessman in the community. At the original sentencing, the trial judge stated: "I believe you were in the drug business, and I'm going to sentence you to prison because of that." (Reporter's Transcript, February 4, 1974, P. 9).

PRESENTATION OF FEDERAL ISSUES

The question of whether petitioner was accorded, in substance, due process of law in regard to his sentencing and particularly in regard

to his being denied the right to disclosure of information supportive of the charge that he was part of a large group of narcotic dealers and distributors was initially presented to the trial court, the Superior Court of Pima County, Arizona, in the course of hearing on petitioner's Rule 60 (c) petition to vacate sentence. Petitioner sought information with respect to all sources of this information but was denied disclosure of certain information on the basis of privilege or that an ongoing investigation would be prejudiced. See, e.g. Reporter's Transcript of February 19, 1974, pages 47-54; see also Reporter's Transcript of March 5, 1974, pages 8-14. The issue was presented to the Arizona Supreme Court at pages 13-17 of Appellant's Opening Brief in that court. The Supreme Court of Arizona affirmed the Superior Court, thus determining the issue adversely to petitioner.

REASONS FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN REGARD TO SENTENCING IN THAT HE WAS DENIED THE RIGHT TO ASCERTAIN THE SOURCE OR THE PARTICULARS OF THE ALLEGATIONS THAT HE WAS INVOLVED IN LARGE-SCALE CRIMINAL ACTIVITIES BEYOND THE SCOPE OF THE CRIME OF WHICH HE WAS CONVICTED

A. Williams v. New York is susceptible of misconstruction and does not control the present case.

It is the right of a convicted person not to be sentenced upon invalid premises. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

The case of Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), has frequently been construed as clothing a sentencing judge with blanket authority to withhold disclosure of presentence investigation materials. See, e.g., United States v. Solomon, 422 F.2d

1110, 1121 (7th Cir. 1970).

Even the manner in which this Court adhered to and distinguished Williams v. New York, in Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) suggests such a construction.

Williams v. New York, was, however, a very much narrower holding, in that the petitioner in Williams did not dispute the accuracy of the presentence information before the Court. The point is well made in United States v. Weston, 448 F.2d 626 (9th Cir. 1971), which is similar to the present case:

> "Weston's case, however, is different from Williams. She vigorously denied the accuracy of the charges and objected to the judge's consideration of them without more substantiation of them than appeared in the probation report. Williams appar-

ently did neither. See Williams v. New York, supra, 337 U.S. at 244, 69 S.Ct. 1079. Williams had admitted a number of burglaries. Furthermore, Williams' constitutional attack was much broader. He challenged the use of any hearsay information whatsoever in sentencing unless a trial-type hearing were held complete with due process safeguards and standard rules of evidence. In short, he urged that sentencing should be turned into a second trial. This the Supreme Court declined to do. Weston's case does not present that issue."

The Court in United States v. Weston was obviously referring to the following language in Williams v. New York, which appears at 337 U.S. at 244, 69 S.Ct. 1079,

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked

> to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise."

The tendency of courts to misconstrue Williams v. New York and its progeny, Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d (1959) is noted forcefully in a Note, "Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion" 26 Hastings Law Journal 1527 (1975). Williams v. Oklahoma is like Williams v. New York; there was there also no challenge to the accuracy of the informational input, but only the contention as in Williams v. New York that such information should have been established under oath in adversary proceedings.

The present case like Weston involves challenged allegations or factual premises and is

not controlled by the Williams cases.

B. Denial of disclosure places an unfair burden upon the convicted person.

If Williams v. New York is as broad a holding as one might arguably assert by focusing solely upon the language quoted in Specht v. Patterson, supra, it would be at war with the essential premise of United States v. Tucker, supra, and basic principles of rudimentary fairness.

Not long after Williams v. New York was rendered, an experienced Federal District Court Judge wrote as follows:

> "Despite the latitude permitted by the Due Process clause (citing Williams v. New York), it seems to me that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it. Audi

> alteram partem, if it is not a universal principle of democratic justice, is at any rate sufficiently well-founded not to be departed from by a trial judge when he is performing his most important function." A Trial Judge's Freedom and Responsibility, Charles E. Wyzanski, Jr., 65 Har.L.Rev. 1281, 1291-92 (1952)

Judge Wyzanski's thesis that one-sided communication to the Court is fundamentally wrong is echoed forcefully in State v. Kunz, 55 N.J. 128, 259 A.2d 895, 40 A.L.R. 3rd 659 (1969). The facts in Kunz have particular relevance to the present case. Kunz was found guilty of the offense of having purchased one stolen automobile. He was charged in the presentence report with being the New Jersey contact for a stolen vehicle ring, specializing in Cadillacs. The charge was vigorously denied when it became known by Kunz' counsel. Kunz was a businessman and this was his

first brush with the law. The court in Kunz ordered production of the presentence report and that the convicted person be given "fair opportunity to be heard on any adverse matters relevant to the sentencing." 259 A.2d 903. The charge here is involvement in continuous and large-scale criminal enterprise. The relevant question is whether such a damning charge can be met against an informational vacuum. The analogous charge in the case was United States v. Weston, supra, prompted this judicial answer:

> "This will not do. It is tantamount to saying that once a defendant has been convicted of offense A, narcotic agents can say to the probation officer, and the probation officer can say to the judge, 'We think that she is guilty of much more serious offense B, although all we have to go on is an informer's report,' and the judge can then say to the defendant, 'You

> say it isn't so; prove that to me!' In addition to the difficulty of 'proving a negative,' we think it a great miscarriage of justice to expect Weston or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is." 448 F.2d at 634

C. Application of Williams v. New York gives rise to illogical distinctions.

The confusion previously noted surrounding Williams v. New York has resulted in an attempt by the lower federal courts to accomodate their conceptions of that authority with the underlying premises of Townsend v. Burke and United States v. Tucker, supra. What appears to be evolving is a rule which would require disclosure for rebuttal of sources and particulars only where the sentencing judge "explicitly" or "demonstrably" relies upon the particular allegation or informational charge at issue. See Shelton v. United

States, 497 F.2d 156, 159 (5th Cir. 1974); United States v. Espinoza, 481 F.2d 553, 556 (5th Cir. 1973); Collins v. Buckhoe, 493 F.2d 343, 345 (6th Cir. 1974).

A rational basis for this rule would exist if sentencing judges were required to articulate reasons for sentencing, as has been proposed. Note, "Procedural Due Process at Judicial Sentencing for Felony," 81 Harvard Law Review 821 (1968); and see United States v. Miller, 495 F.2d 362, 365 (7th Cir. 1974). The rule is haphazard in the absence of such a requirement because it makes disclosure dependent upon the individual sentencing judge's inclination or disinclination to state reasons in the particular case. It is also anomalous in that the right to disclosure can only be ascertained after sentence is pronounced.

The situation is different where the sen-

tencing judge disclaims reliance upon the critical allegation. See, e.g., Putt v. United States, 363 F.2d 369 (5th Cir. 1966). That is not the case here. This case, like United States v. Weston and State v. Kunz, supra, involves essentially the charge of other criminal conduct. In the absence of an express disclaimer the presumption would have to be that such an allegation was an operative factor in determination of sentence. See United States v. Tucker, supra.

D. Due Process of Law requires the opportunity to test challenged allegations and there is a present need for the determination.

Sentencing is a critical stage of a criminal prosecution and states are required by the Fourteenth Amendment to provide the convicted person with counsel. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). The function of counsel at sentencing is to "marshal

the facts" for the convicted person relevant to the subject of sentencing. Id. There can be little if anything of greater relevance than the extent and duration of the convicted person's involvement in criminal activity and counsel is unable to effectively marshal the facts in rebuttal if he is denied access to sources and particulars.

Sentences may be affected by many diverse factors but sentences are basically imposed for criminal conduct. The nature and extent of the criminal conduct that the convicted person has been engaged in is therefore an outstandingly relevant consideration.

Standards of basic fairness as developed and articulated in cases such as United States v. Weston, 448 F.2d 626 (9th Cir. 1971) and State v. Kunz, 55 N.J. 128, 259 A.2d 895, 40 A.L.R. 3rd 659 (1969) point to the need for a comprehen-

sive statement and more certain guideposts in the use of information for sentencing, at least where the essence of the charge is the extent of criminal conduct of the convicted person. If cases such as the present one accurately describe the state of the declared law, prosecuting authorities are given a broad latitude to attribute greater criminality to a convicted person than could be shown and the convicted person is essentially left to denying the charge without having the opportunity to test its basis. The prosecution here has conveyed its beliefs via the presentence investigating officer to the sentencing judge irrebutably, that is, it has coupled them with the claim of privilege by reason of prejudice to an on-going investigation. A determination based upon such a claim should at least be reviewable; this one is not.

The issue presented here is recurrent. It is the subject of professional concern. See Note, "Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination" 3 Rutgers (Camden) L.J. 111 Williams v. New York is inadequate to the task.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that the petition be granted and the cause reviewed.

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

and of the State wherein they reside. No State shall make or enforce any law shich shall abridge the privileges or immunities of citizens of the United States; nor shall any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

(Commencing on next page)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Division

THE STATE OF ARIZONA,	)	No. 2987
	)	
Appellee,	)	MEMORANDUM DECISION
	)	(Not for publi-
v.	)	cation, Rule
	)	48, Rules of
ALBERT ARTHUR QUIROZ,	)	the Supreme
	)	Court)
Appellant.	)	
	)	

Appeal from the Superior Court of Pima County

Cause No. A-23951

The Honorable Jack G. Marks, Judge
The Honorable Robert O. Roylston, Judge

SENTENCE AFFIRMED

N. Warner Lee, Former Attorney General — Phoenix
Bruce E. Babbitt, The Attorney General
By Thomas A. Jacobs, Assistant Attorney General
Attorneys for Appellee

Healy and Beal — Tucson
By William T. Healy
Attorneys for Appellant

CAMERON, Chief Justice

This is an appeal from a sentence of not less than five nor more than five years and one day after a plea of guilty to the charge of unlawful transportation of marijuana, a felony, A.R.S. § 36-1002.07.

Defendant was indicted by a Pima County Grand Jury on or about the 9th day of Auguat 1973 for unlawful transportation of marijuana, A.R.S. § 36-1002.07, and unlawful sale of marijuana, A.R.S. § 36-1002.07. He entered a plea of guilty to this charge and on 4 February, after a hearing in mitigation and aggravation, was sentenced to serve a term of not less than five nor more than eight years in the Arizona State Prison. Thereafter, on 8 February 1974, after a change of counsel, defendant petitioned to vacate the sentence pursuant to Rule 60 (c) of the Arizona

Rules of Civil Procedure, 16 A.R.S., or Rule 24.2 and 24.3 of the Arizona Rules of Criminal Procedure 1973. After a hearing on the motion, at which time the defendant's attorney extensively cross-examined the probation officer, the trial court reduced the sentence to five years and five years and one day. From said sentencing the defendant appeals.

Both the trial court and counsel for the State and the defendant were uncertain as to whether this matter was controlled by the old Rules of Criminal Procedure or the new Rules of Criminal Procedure which took effect 1 September 1973. We are of the opinion that this hearing was controlled by the old Rules of Criminal Procedure pursuant to Rule 1.5 which reads as follows:

> "These rules shall govern all criminal actions commenced on or after twelve o'clock mid-

night, 1 September 1973."
Rules of Criminal Procedure
1973, 17 A.R.S.

We have held that under the old rules and Rule 60 (c) of the Rules of Civil Procedure, 16 A.R.S., that while a court cannot entertain a motion to withdraw a plea of guilty after pronouncing sentence, State v. Barnes, 100 Ariz. 334, 414 P.2d 149 (1966), the court

> "* * * may modify or vacate its judgments and sentences if the defendant is able to bring himself within the provisions (mistake, inadvertence, surprise, excusable neglect) of Rule 60 (c) of the Rules of Civil Procedure, 16 A.R.S.
> * * *
>
> "No appeal having been perfected at the time of the motion to set aside the plea, the trial court still had jurisdiction to modify or vacate the judgment. * * * " State v. Hanley, 108 Ariz. 144, 146, 493 P.2d 1201, 1203 (1972).

It was the contention of the defendant that part of the presentence report which was excised should have been made available to him, and assuming this is an old rule case the case of State v. Pierce, 108 Ariz. 174, 494 P.2d 696 (1972) would apply. In Pierce, supra, we adopted the statement of the American Bar Association on Standards for Criminal Justice Sentencing Alternatives and Procedures which contains:

> "* * * In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. * * *" 108 Ariz. at 175, 494 P.2d at 697.

This was done in the instant case, and we believe that the reasons given by the court for excising a part of the presentence report were adequate.

We might state that we have read the excised portion of the presentence report and while we find that it expresses the bias of the probation officer we do not find any factual allegations which were not met in the extensive cross-examination of the probation officer and in arguments to the court.

It is noted that the parties and the court proceeded without objection under Rule 24.2 and Rule 24.3 of the Arizona Rules of Criminal Procedure 1973, 17 A.R.S., rather than the old rules. We have reviewed the record in this light and we find no violation of Rule 24.2 or 24.3 of the Rules of Criminal Procedure 1973 in this matter. We find no error.

Sentence affirmed.

/S/
JAMES DUKE CAMERON,
Chief Justice

CONCURRING:

/S/
FRED C. STRUCKMEYER, Jr.,
Vice Chief Justice

/S/
JACK D. H. Hays,
Justice

FILED

Nov 19 1975

Clifford H. Ward
Clerk Supreme Court
By

APPENDIX C

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

December 24, 1975

THE STATE OF ARIZONA, Appellee, vs. ALBERT ARTHUR QUIROZ, Appellant.	Supreme Court No. 2987 Pima County No. A-23951

The following action was taken by the Supreme Court of the State of Arizona on December 23, 1975 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Sentence enclosed herewith.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: William T. Healy, Esq., Healy and Beal, 504 Home Federal Savings Tower, Tucson, Arizona 85701
Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 Attn: Thomas A. Jacobs and Lynn Hamilton
Dennis DeConcini, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701

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